CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE

In the Matter of	)	
	)	
ELITE SHOW SERVICES, INC.	)	
	)	**OPINION AND**
and	)	**AWARD**
	)	
LOCAL 2028, SEIU	)	C.S.M.C.S. CASE NO. 99 3 594
	)	
C* GRIEVANCE**	)	
_____	)	

APPEARANCES

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INTRODUCTION

Michael C*** ("C" is grieving his discharge from his position as an usher with Elite Show Services, Inc. ("Elite") and the San Diego Chargers (the "Chargers"). According to Elite, C*** was guilty of dishonest conduct when he peered into a skybox where women were changing, after having been previously told not to, and insubordination, for refusing to obey a supervisors' instructions to move away from the skybox. C*** denies the charges and claims that even if any or all of the charges are true, they don't constitute just cause for dismissal.

This arbitrator was selected from a list provided by the California State Mediation and Conciliation Service. Hearings were held on December 14, 2000, and February 2, 2001.

Closing briefs were submitted on or before February 15, 2001.

ISSUES

The grievant initially argued that the there had been a settlement in this matter and that the only issue that needed to be determined was whether Elite failed to abide by that settlement. Elite objected to my hearing that issue, arguing that such a "breach of contract" claim was not within the arbitration provision of the collective bargaining agreement (the "Agreement") entered into between the parties. (Jt. Exh. 1.)

After hearing oral argument and reviewing the Agreement, this arbitrator ruled in favor of the grievant on the question of the arbitrability of the settlement issue. Then, after hearing testimony and reviewing the written evidence presented, this arbitrator issued an bench ruling against the grievant finding that no settlement agreement had been reached.

This arbitrator then heard the following stipulated issues:

1. Did Elite have just cause to discharge Michael C***?

2. If not, what is the appropriate remedy?

FACTS

Background

At all times here relevant, the San Diego Chargers and SEIU Local 2028 (the "Union") were parties to a collective bargaining agreement. (Jt. Exh. 1.) The Chargers subcontracted with Elite Show Services, Inc. to hire, fire, and supervise ushers and ticket takers at Chargers home games. According to Gus Kontopuls, Elite is the "employer of record." However, Elite does not deny that it is bound by the terms of the Agreement between SEIU Local 2028 and the Chargers with regard to grievant C's employment rights.

Prior to his discharge, C*** had worked for the Chargers as an usher at Qualcomm Stadium (the "stadium") for 28 years. The record does not indicate that C*** had ever been disciplined prior to his discharge.[1]

The Chargers also have a contract with Volume Services America ("Services America"), which provides food and catering services at Chargers games. There is no contractual relationship between Services America and Elite.

The Incidents of December 5 and December 26

On both December 5 and December 26 (two consecutive Chargers home games) C*** was assigned to work in an area that encompassed the skybox used by Alex Spanos, the owner of the Chargers. Services America hired and supervised the employees who worked in that skybox.

Katy Chapman, one of the Services America employees assigned to the Spanos skybox testified that there are normally five employees there on game days: four females and one male. Each employee is required to wear a uniform, which, at the time, was provided to the employees by the Chargers on the day of each game. Chapman testified that it was her practice, and the practice of the other employees assigned to the Spanos skybox, to change into their uniforms inside the skybox on the morning of the games, prior to Spanos' arrival.

The skybox has a large open window in the front that allows patrons inside the skybox to view the action on the field. Obviously, that window also enables people who are outside the skybox to look inside the skybox. Pictures introduced by Elite show that one can look into the

[1] There was some testimony as to a prior incident where C*** was asked not to peer into a skybox. However, he complied and the incident did not lead to discipline.

skybox from portions of the aisle adjacent to the side of the skybox. However, if one stands at the top of the aisle, people inside the skybox are shielded from view by the side wall of the skybox. If one stands at the very bottom of the aisle, the angle of view into the skybox would probably prevent one from seeing anything below the heads of people inside the skybox. (Elite Exh. A.)

Ms. Chapman testified that on December 5, she and her co-workers were changing when they noticed that C*** was in the area. One of her co-workers went to complain. According to Ms. Chapman, the same thing happened again on December 26. That day, she and her co-workers started to change and then noticed that C*** was looking into the skybox. Chapman testified that one of her colleagues went out to speak with C*** and ask him to move so that they could have privacy. C*** allegedly refused, claiming that he needed to guard his assigned area. Eventually, C*** moved to the top of the stairs. However, according to Chapman, he was only gone for a short while and then came back to where he could see the people inside the skybox. Chapman testified that she was "shocked and creeped out" by C's conduct.

Elite also introduced a January 4 memo from Judy Monroe, a Services America employee, about C's behavior on December 5 and December 26. That memo indicated that C*** was asked to leave on both occasions and that on both occasions he argued that the women should not be changing in the skybox. (Elite Exh. E.)

Katy Chapman's husband, Paul Chapman, worked for the Chargers. One of his assignments was to act as host in the Spanos skybox. Paul Chapman testified that on one occasion (probably December 26[2]) he saw C*** standing on the side of the Skybox, leaning over

[2] Paul Chapman was not sure whether this had taken place on the December 5 or December

and peering into the skybox window for about 20-30 seconds. Chapman testified that he was not sure whether anyone was actually changing at the time he saw C*** looking into the window.

Paul Chapman testified that he went to speak with John Holiday and Tracy Richardson, Elite's two security supervisors and asked them to deal with the situation. Tracy Richardson was not available as a witness. However, Elite introduced a written report of the December 26 incident which Richardson had written. (Elite Exh. G.) In that report, Richardson indicated that he spoke with C*** in response to Chapman's request and told C*** that he should stand at the top of the aisle and not be peering into the skybox. According to Richardson's report, C*** "refused to do what [he was] instructed." Richardson wrote that C*** "stated that he didn't have to follow [Richardson's] instructions because [Richardson] was not his supervisor." Richardson's report indicted that C*** continued to refuse to obey his orders. However, according to the report, Richardson had to leave before the matter was resolved and he asked Holiday to finish dealing with C***.

Holiday testified at the hearing and corroborated most of Richardson's report. He too characterized C*** as argumentative and insubordinate. According to Holiday, C*** kept stating that he was in his assigned area and that he didn't have to leave it. However, like Richardson, Holiday was not able to stay and resolve the matter. Holiday called Jim Killday, C***'s immediate supervisor, and asked him to deal with the matter.

The Investigation

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26. However, based on his testimony that he contacted Tracy Richardson on the day of the incident, it appears that Chapman's testimony relates to December 26.

John Kontopuls, Elite's President, testified that after he heard about the incident he asked Ken Mikelson to investigate. At the time, Mikelson was in charge of Elite's ushers. Mikelson did write a brief report, dated December 26, about the incident. (Elite Exh. E.) The report merely summarizes information about the complaints from Services America employees.

Mikelson did not testify and it is not clear from his report whether C*** was interviewed on that day. However, John Kontopuls testified that he was with Mikelson when he interviewed C***, and that it occurred on December 26. According to Kontopuls, C*** did not deny the charges, and only stated that he was simply doing what he had been instructed to do. As will be discussed later, Kontopuls also testified that he instructed Mikelson *not* to be specific with C*** about allegations of wrongdoing.

Kontopuls testified that the decision to fire C*** was made on December 28, at Elite's next staff meeting. According to Kontopuls, Mikelson was present at the meeting and reported on his investigation, including his conversation with C*** and conversations he had with Holiday and Richardson.

Kontopuls testified that there was no reason for C*** not to follow Richardson's and Holiday's instructions. All employees were told during orientations that the supervisors listed and pictured in the employee handbook (Elite Exh. B) had the "authority of god". Both Richardson and Holiday were supervisors whose pictures appeared in the book. Employees were also told that these supervisors could alter an employee's post assignment. Employees were also told that if there is any question, they should obey these supervisors' instructions and then, if necessary, seek clarification from their immediate supervisors.

According to Kontopuls (and as indicated by the pictures) C*** could have stayed in his

assigned area while at the same time complying with a request that he not look into the skybox. Moreover, Kontopuls testified that ushers need to be at the top of the stairs to greet and assist patrons. From that position, C*** would not have been able to look into the skybox.

C*'s Testimony**

C*** testified that he was contacted by Judy Monroe on December 5th and asked to move away from the skybox while the women were changing. C*** testified that he questioned why the women needed to use the skybox as a place in which to change instead of using a restroom. C*** expressed concern that the inside of skybox was visible from various parts of the stadium and that the women could be seen by members of the public. C*** denied that he ever peered into the skybox to watch the women.

C*** testified that he was assigned to the same work area on December 26. Once again, a Services America employee came out and asked him to move. He testified that refused because he could not leave his assignment without the permission of his supervisor. Again, C*** testified that he never looked into the skybox and didn't see anyone changing.

C*** acknowledged that Richardson was called and that Richardson asked him to leave. C*** admitted that he questioned Richardson about why he had to leave but claimed that he did not argue with Richardson and that he complied with Richardson's order. According to C***, a little while after this discussion, his immediate his supervisor called and told him to work the rest of the game at the Club level.

C*** denied having been interviewed about the incident by Mikelson on the 26th. C*** testified that he first found out there was a problem with his continued employment on the 29th, when he reported to Qualcomm to work at the Holiday Bowl game. C*** testified that when he

reported on the 29th, his name wasn't on the list. He then spoke with chief usher Judy Kammer, who told him that he'd have to speak with Mikelson.

C*** testified that he then spoke with Mikelson, who asked him about the incident at the Chargers game on the 26th. C*** testified that he explained what happened.

At some point C*** provided Elite with a written statement. In that statement he admitted that he had been asked to leave the area by Tracy Anderson. In response he suggested that the women move. According to C***'s statement, he moved when and as instructed. Unfortunately, the written statement is not dated.

The Notification

On December 29, 1999, Elite sent C*** a letter telling him that his services were being terminated. No reason was given. (Union Exh. 1.) On January 5, a letter was fax'd to the Union which contained the following entry on a long list of disciplinary actions: "Michael C*** received poor performance for 12/26 Chargers game. Employee has been terminated." (Elite Exh. E.)

On January 11, 2000, after making a request, the Union first received a copy of C***'s termination letter as well as a Mikelson's December 26 report. As indicated, that report only briefly outlines Monroe's report of C***'s conduct . It says nothing about C***'s alleged interaction with Richardson or Holiday. (Union Exh. 1 and Elite Exh. E.)

On January 12, 2000, a timely grievance was filed. Thereafter, in response to a Union request, Elite sent C*** a letter, dated January 26, 2000, indicating that his termination was based on "gross performance violation, insubordination and performing a dishonest act while on duty" all of which allegedly occurred on December 26, 1999. (Union Exh. 1 E.) The parties

have stipulated that the requisite steps in the grievance process were taken and that the matter is properly before me.[3]

DISCUSSION

Discharge is the "capital punishment" of labor law. As a result, it is generally agreed by arbitrators that a discharge should not be sustained except upon clear and convincing evidence. *In re Rohr Industries*, 93 LA 145 (Goulet, 1989). Gus Kontopuls testified that the two grounds for discharge were insubordination and dishonesty. Each charge will be discussed separately.

Was C* Insubordinate?**

Although it was never clearly stated in any of the charging documents, the apparent basis of the insubordination charge was C***'s failure to follow the instructions of Richardson and, perhaps, Holiday. Insubordination has been defined as the "deliberate and willful refusal to carry out a proper order". *National Carbide Co.*, 24 LA 516, 524 (Wains, 1985). Insubordination implies defiance. Merely being argumentative does not necessarily constitute insubordination. Thus, there is a factual dispute as to whether C*** deliberately and willfully refused to obey Richardson's and Holiday's orders to the point of insubordination or whether he merely questioned those order, perhaps in an effort to explain his position, before complying.

There were three witnesses to the alleged acts of insubordination: Richardson, Holiday,

[3] As indicated, one issue presented was whether the parties had actually settled the grievance prior to the hearing. In light of my ruling against the Union on that claim, I will not restate all of the events which occurred between the filing of the grievance and the hearing.

and C***. Richardson was not available to testify; his version of his interaction with C*** came in through a written report, which is hearsay. While hearsay is admissible in an arbitration hearing, the weight of authority is that a discharge cannot be based on uncorroborated hearsay. See, e.g., *In re Duke*,100 LA 316 (Hooper, 1993) [overturning a discharge for egregious acts of sexual harassment]; *In re Tarmac Virginia and Teamsters Local 592*, 95 LA 813 (Gallagher, 1990) [overturning a discharge for drug dealing]. Thus, if the only support for the charge was Richardson's testimony, the charge could not be sustained.

However, Holiday overheard some of the conversation between C*** and Richardson. In addition, Holiday testified that C*** failed to immediately obey his own instructions and, instead, argued. I found Holiday to be credible. Because Elite employees were told to immediately obey instructions given by Holiday and Richardson, I find that Elite has sustained it claim that C*** was guilty of *some* insubordination on December 26.

Did C* Engage in an Act of Dishonesty?**

The are really two issues subsumed within this question: whether C*** was guilty of peeping and whether that constituted "dishonesty." On the first issue, I am satisfied that Elite has proved that C*** did look into the skybox on two occasions while female employees were changing. I believed both Katy Chapman and Paul Chapman and discount C***'s denials.

On the second issue, however, I have some problems. I am not sure why C***'s conduct constitutes "dishonesty". It could certainly be characterized as "improper," "impolite", "intrusive", and "inappropriate". However, I don't find it to be an act of dishonesty as that term is generally used. Cases involving employee dishonesty usually involve theft, or some misrepresentation that has financial consequences. See, e.g., *Southern Cal. Edison Co.*,

70-1 ARB & 8066 (Sinclitico, 1969).

Was There Just Cause to Terminate?

Even though I have found that C*** was guilty of misconduct, the issue of penalty must still be addressed. In the classic case of *Enterprise Wire Co.*, 46 LA 359 (1996), Arbitrator Carroll Daugherty set out his now famous seven "tests" for just cause. These tests, are presented in the form of questions and Daugherty suggests that a negative answer to any one would normally signify that just cause does not exist. (*Id.* at p. 362.) I find that the discharge here violates at least two of these tests.

The first question posed by Daugherty is "did the company give the employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct?" Here, the answer is no. To the extent that the discharge is based on the "peeping," nothing in the rules directly governs. Should C*** have known that his conduct was wrong? Certainly. Did he have reason to know that he could lose his job? No.

In reaching this conclusion, I find it significant that no one from Elite spoke with C*** after the December 6 incident. In fact, the uncontradicted testimony indicates that C*** brought the problem to his supervisor's attention after the incident on December 6 yet he never got any response or guidance.

My analysis is the same for the insubordination. While the collective bargaining agreement does caution employees that they could be discharged for insubordination, it does not indicate that all acts of insubordination will lead to discharge. Moreover, when comparing C***'s conduct to conduct in other cases, it is difficult to find that his conduct warrants discharge. For example, a discharge was sustained in *In re Young's Market Co.*, 97 LA 356

(Bickner, 1991) for "flagrant insubordination" which also involved an injury to a co-worker. Similarly, in *In re HBI Automotive Glass.*, 97 LA 121 (Richard,1991) a discharge was sustained for "gross insubordination" and an assault upon a supervisor. At best, I would characterize C***'s insubordination as "borderline." He may have crossed the line in protesting. However, I think he did so in an effort to explain, not with any intent to defy.

The discharge here also violates a second test for just cause. Arbitrator Daugherty asks: "Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?" Arbitral case law indicates that this cannot be a one-sided investigation.

For example, in *McCartney's Inc.*, 84 LA 799 (1985), Arbitrator Wallace Nelson overturned a discharged stating:

> A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity, before sentence is carried out, to be heard in his own defense.

Here, Elite, during its investigation, intentionally deprived C*** of that opportunity. Mikelson, the only person who spoke with C*** prior to his discharge, was specifically instructed *not* to tell C*** what he was accused of. That is a gross violation of C***'s right to industrial due process.

Throughout these proceedings, Elite has tried to suggest that nothing C*** could have said would have mattered since the essential facts were known. That is simply not true. For example, Elite did not know, prior to the hearing, that C*** claimed that he had raised the whole problem with his supervisor after the December 5th incident. Had the supervisor responded by investigating and then taking appropriate corrective action (such as instructing C*** that

changing in the skybox was permitted and that he needed to follow the request of Monroe) then the December 26th incident would never have occurred.

Similarly, arbitrators frequently refuse to sustain discharges when management has failed to fulfill a specific procedural requirement in the collective bargaining agreement. See, e.g. *Polysar, Inc.*, 91 LA 484, 484 (Strasshofer, 1988). Under Art. 6, subdivision (B) of the Agreement here, Elite was required to notify the Union within 72 hours of C***'s termination. (Jt. Exh. 1.) While there is no language which makes that notification a pre-condition to the validity of a termination, prompt notification here might have led to a quicker airing of both sides' positions and settlement prior to arbitration. If nothing else, it further illustrates Elite's pattern of failing to abide by important procedural rights.

What Penalty is Appropriate?

Gus Kontopuls testified that termination was necessary because "this wasn't an isolated incident" and that he was concerned about Elite's exposure to suits by women who might be victimized by C*** in the future. Similarly, Elite argues in its closing brief that if the termination is not sustained, potential "liability issues would be gargantuan. Elite also argues that if nothing is done, the Chargers might consider "drastic action".

Given the fact that the Chargers seemed quite content to settle this matter and let C*** have his job back, the last claim cannot be given credence. Similarly, there is nothing in C***'s background or history which suggests that he would engage in this conduct again. C*** was never really given a chance to comply with the rules because until the incident on the 26th, no one at Elite addressed the issue. As indicated, C*** had raised the matter with his supervisor on the 5th, but never got a response. Finally, there is no reason why C*** need ever again be in

such a position. It is a simple matter for Elite to make sure that C*** is assigned an area of the Stadium where this problem doesn't exist. Given C***'s long, discipline free, work history, I assume that this was an isolated incident which will never happen again.

However, since I have found misconduct by C***, some penalty is appropriate. In other cases involving insubordination B even borderline B I have routinely upheld suspensions of up to 30 days. Since C*** has missed fewer days than that, I think the most appropriate resolution of the grievance here is to simply grant reinstatement without back pay.

AWARD

C*** should be reinstated without back pay.

Dated: March 5, 2001

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Jan Stiglitz